Supreme Court, U.S.
FILED

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No. 961313 JAN 14 1997

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

THOMAS DODSON,

Petitioner,

vs.

MARVIN RUNYON,
Postmaster General for the
U.S. Postal Service,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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20 pp

QUESTION PRESENTED

Was the avoidance by the courts below of the venue issue raised in petitioner-attorney's Affirmation In Opposition and Suggestion For Rehearing In Banc an infringement on petitioner's due process rights under the Fifth Amendment to the Constitution of the United States?

TABLE OF CONTENTS

Page

Question Presented i

Opinion Below 2

Jurisdiction 3

Constitutional Provision and Rule Involved 3

Statement of the Case 4

Reason for Granting the Writ

The court of appeals could and should have readily reversed and remanded the case to the district court at White Plains where it was properly venued for further proceedings 8

Argument 8

Conclusion 10

TABLE OF AUTHORITIES

Cases Cited:

Dodson v. Runyon
86 F3d 37 (2d Cir.1996) 2

In Re: International Business Machines Corporation
45 F3d 641(2d Cir.1995) 7

TABLE OF CONTENTS
(continued)

Page

Cases Cited:

Minnette v. Time Warner
997 F2d 1023(2d Cir.1993). 9

Constitutional Provision Cited:

Fifth Amendment 3

Rule Cited:

Rule 10_.1(a), Supreme Court Rules . 3

APPENDIX

Appendix A - Opinion and Vacatur
and Remand Order. . . . 1a

Appendix B - Order on Rehearing. . . 12a

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PETITION FOR WRIT OF CERTIORARI TO THE
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FOR THE SECOND CIRCUIT

The petitioner, Thomas Dodson, respectfully prays that a writ of certiorari issue to review the order and decision of the United States Court of Appeals for the Second Circuit entered in this proceeding on October 16, 1996, denying petitioner's petition for re-

hearing of the circuit panel's decision and determination entered herein on June 12, 1996 which vacated the district court's order and judgment of dismissal and remanded the action for further proceedings consistent with the circuit panel's opinion.

OPINION BELOW

The circuit panel's opinion and vacatur and remand order were entered June 12, 1996. The panel's opinion is reported as Dodson v. Runyon, 86 F.3d 37 (2d Cir. 1996, and is reproduced as Appendix A to this petition.

A timely petition for rehearing containing a suggestion for rehearing in banc was denied on October 16, 1996. And the circuit panel's order on rehearing is reproduced as Appendix B to this petition.

JURISDICTION

The judgment of the court of appeals was entered June 12, 1996. Petitioner's petition for rehearing was denied on October 16, 1996, and this petition was served and filed within ninety days of the latter date. The jurisdiction of this court is invoked under Title 28, United States Code, §1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fifth Amendment to the Constitution of the United States reads in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . ..

Rule 10_.1(a) of this court's Rules provides for review by this court on certiorari:

> when a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

STATEMENT OF THE CASE*/

Following his retention in medias res by a pro se plaintiff who had commenced this employment discrimination civil rights action in the district court in lower Manhattan rather in the district court at White Plains, the county seat of Westchester County where the plaintiff resided and the Croton-on-Hudson post office was located, the plaintiff's attorney served and filed a notice of appearance in the action on or about May 18, 1990, and, at the same time, also served and filed a Notice of Deposition directed to Frank Ozimek, a supervisor of postal operations at the Croton post office(7-8).

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*/ Numerals in parentheses are keyed to pages of the Joint Appendix used on the appeal to the court of appeals.

The defendant's attorney promptly informed the plaintiff's attorney by letter that the noticing of the Ozimek deposition was improper because the deponent-to-be was no longer employed by the postal service and under the government's control, but, nevertheless, agreed to cooperate with counsel and go forward with the Ozimek deposition, which he did(10-11).

After the taking of the Ozimek deposition, no further depositions or other discovery proceedings were undertaken by the plaintiff's attorney(18). In the meantime, the district court(Edelstein, J.) never acknowledged the plaintiff attorney's presence in the case or undertook to communicate with him in any manner following the plaintiff attorney's appearance in the case.

Additionally, the defendant's attorney

unsuccessfully sought leave of the district judge to make dispositive motions in the case, but, nevertheless, moved sua sponte under Rule 41(b) for the dismissal of the amended complaint for want of prosecution, or, in the alternative, for summary judgment in the defendant's favor(18-19).

Plaintiff's attorney responded to the Rule 41(b) motion by affirmation calling attention to the plaintiff's discovery needs, i.e., the need to depose a number of postal service employees whose whereabouts and employment status was unknown to the plaintiff, counsel's concern about the wrong venue of the action, and the fact that he had had no direct contact with the district judge while noting the absence of any Rule 16(b) judicial management status in the case(20-21, 25-26).

Judge Edelstein took the defendant's Rule 41(b) motion under advisement for the better part of two(2) years before rendering his ruling exactly twenty(20) days after he had been removed for cause from the IBM antitrust case which he micromanaged for forty(40) years(12,28). See In Re: International Business Machines Corporation, 45 F.3d 641(2d Cir.1995)[1995 U.S. App. LEXIS 825].

At the time of the district judge's dispositive ruling in the case, the pleadings per se to which the judge's attention was drawn in the plaintiff attorney's Affirmation in Opposition, squarely presented the out-of-venue issue as the result of the defendant's admissions in paragraphs 2,3, and 4 of the amended complaint(1,4).

Additionally, the plaintiff's attorney reiterated the out-of-venue issue in the plaintiff's motion for rehearing(Sug-

gestion for Rehearing in Banc, p.4-5) in the following language:

> Also to be considered by this court in banc is the continuance of the case in the wrong venue. The pro se plaintiff filed his original complaint at Foley Square instead of at White Plains where all the parties reside or do business, i.e., Ossining and Croton-on-Hudson. Local District Court Rule 21(a)(i) requires that this case should be filed at White Plains. The writer pointed this out in his opposing affirmation below(21), but the venue question has not been addressed by the district judge or the circuit panel. It should be dealt with by this court in banc. The implementation of Rule 21(a)(i) may well provide a salutary solution to this vexing problem.

REASON FOR GRANTING THE WRIT

THE COURT OF APPEALS COULD AND SHOULD HAVE READILY REVERSED AND REMANDED THE CASE TO THE DISTRICT COURT AT WHITE PLAINS WHERE IT WAS PROPERLY VENUED FOR FURTHER PROCEEDINGS.

The circuit panel was apparently so preoccupied with counsel-bashing post argument that the panel, and ultimately,

the second circuit in banc, they neglected or refused to accord the plaintiff the nominal relief to which he was justly entitled as manifested in the pleadings in the case. The circuit panel and court, having reversed and remanded the case, were under a duty not to perpetuate the out-of-venue status of the case of which the courts below had notice from the case pleadings, but, rather, were required to transfer the case to its proper venue, in this case, White Plains. See and compare Minnette v. Time Warner, 997 F.2d 1023,1027(2d Cir.1993) where a second circuit panel, in reversing the district court's Rule 41(b) dismissal of a pro se plaintiff's Title VII employment discrimination suit against the defendant Time Warner, remanded the case to the Eastern District of Virginia as alternatively sought by the moving defendant.

It is respectfully submitted that although reasons may differ on a case by case basis for reversing a Rule 41(b) dismissal, the resulting remand relief rendered by the reviewing court should always be appropriate to the circumstances of the case and correct. Since that end result cannot be attained in the courts below in this case, the plaintiff has nowhere to turn except to this court for such relief in the exercise of its supervisory power.

It is strongly urged that this court order the change in venue in this case to White Plains, New York, in the interests of justice.

CONCLUSION

For the reason stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

_____

ANTONIO MARENO
Attorney for Petitioner

APPENDIX A - OPINION AND VACATUR AND REMAND ORDER

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 293—August Term, 1995

(Argued: October 3, 1995 Decided: June 12, 1996)

Docket No. 95-6035

THOMAS DODSON,

Plaintiff-Appellant,

—v.—

MARVIN RUNYON, Postmaster General for the U.S. Postal Service,

Defendant-Appellee.

Before:

WINTER, JACOBS, and LEVAL,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Edelstein, *J.*), dismissing plaintiff's complaint for failure to prosecute.

Vacated and remanded.

ANTONIO MARENO, Yorktown Heights, NY, Attorney for *Plaintiff-Appellant*.

JAMES L. COTT, Assistant United States Attorney, New York, NY, (Mary Jo White, United States Attorney for the Southern District of New York, Steven M. Haber, Assistant United States Attorney, New York, NY, Of Counsel), Attorneys for *Defendant-Appellee*.

LEVAL, *Circuit Judge*:

Thomas Dodson, acting *pro se*, brought a complaint alleging that he was terminated from his job with the United States Postal Service because of his race, in violation of 42 U.S.C. §§ 2000e to 2000e-17 ("Title VII") and 42 U.S.C. § 1981. Although he attempted energetically to prosecute his case while he was *pro se*, all progress ceased when he retained an attorney. Eventually, the district court granted the government's motion to dismiss for failure to prosecute. *See* Fed. R. Civ. P. 41(b). We find that the district court erred by failing to consider lesser sanctions and other relevant factors before imposing the severe penalty of dismissal. We therefore vacate, and remand for further proceedings.

Background

Dodson was a probationary employee at the Post Office in Croton-on-Hudson, New York. He was terminated from this position in May 1985, as a result of an unfavorable evaluation, which he alleges was motivated by racial animus. Proceeding *pro se* and *in forma pauperis*, Dodson pressed his claims vigorously. He began by filing a complaint with the Equal Employment Opportunity Commission ("EEOC"). When the EEOC rejected his claims, Dodson received a right-to-sue letter and promptly filed a complaint in the United States District Court for the Southern District of New York on June 15, 1987. The district court dismissed the complaint because Dodson had named the Postal Service as defendant rather than naming the Postmaster General.

Still proceeding *pro se*, Dodson filed a motion pursuant to Fed. R. Civ. P. 60(b), seeking an order "relieving him from the judgment entered in this Court on June 28, 1988, and for the entry of a new judgment that will allow him to perfect an appeal to the Court of Appeals." In response to this motion and an intervening change of law, the government modified its earlier position that Dodson was barred on statute of limitations grounds from amending his complaint to correct the pleading error. The district court denied Dodson's Rule 60(b) motion, but vacated its prior order in part, giving Dodson thirty days to amend his complaint.

On May 1, 1989, Dodson filed an amended complaint. The government answered on May 9. The parties then commenced discovery. The government served interrogatories and document requests in July, and noticed Dodson's deposition for October 24, 1989. Still unrepresented, Dodson appeared and gave his deposition.

Dodson then retained counsel, Antonio Mareno, Esq. In May of 1990, Mareno served a deposition subpoena on the government, seeking the testimony of Frank Ozimek, Dodson's supervisor at the time of his discharge. Although Ozimek was no longer employed by the federal government, the government nevertheless arranged for him to be deposed. The deposition was taken on June 20, 1990. So far as the record reflects, that was virtually the last step Mareno took to advance his client's case.

Over two years later, on September 8, 1992, the government wrote to the trial judge pursuant to his rules seeking permission to file a motion to dismiss the action for failure to prosecute, or for summary judgment. Neither the district court nor Dodson's attorney responded to this letter. In January 1993, the government filed its motion to dismiss. Dodson's lawyer filed papers in opposition, but took no further steps to prosecute the case while the motion remained *sub judice* for two years. In February of 1995, the trial judge granted the government's motion, and dismissed Dodson's claim pursuant to Fed. R. Civ. P. 41(b) for failure to prosecute. Dodson appealed.

Discussion

I.

A problem repeatedly faced by trial courts in exercising their discretionary control over case management is how to sanction dilatory conduct by litigants. When delay is caused by a plaintiff, the defendant often seeks dismissal of the cause of action as a sanction.

The selection of the appropriate sanction, including dismissal for failure to prosecute, is a matter consigned to the discretion of the district court, *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633 (1962); *Alvarez v. Simmons Mkt. Research Bureau, Inc.*, 839 F.2d 930, 932 (2d Cir. 1988), and we review the district court's ruling for abuse of that discretion, *Nita v. Connecticut Dep't of Envtl. Protection*, 16 F.3d 482, 485 (2d Cir. 1994). We have long recognized that dismissal is a harsh remedy, not to be utilized without a careful weighing of its appropriateness.[1] And, we have repeatedly noted that one of the factors that should inform a trial court's decision is the suitability of lesser sanctions. *See, e.g.*, *Colon*, 56 F.3d at 7; *Jackson*, 22 F.3d at 74; *Nita*, 16 F.3d at 485. "The remedy [of dismissal] is pungent, rarely used, and conclusive. A district judge should employ it only when he is sure of the impotence of lesser sanctions." *Chira*, 634 F.2d at 665 (footnote omitted).

This is not, of course, the only relevant consideration, though it is a very important one. We have listed various factors as pertinent to the question whether dismissal is an appropriate remedy, including:

> "[1] the duration of the plaintiff's failures, [2] whether plaintiff had received notice that further delays would result in dismissal, [3] whether the defendant is likely to be prejudiced by further delay, [4] whether the district judge has taken care to strike the balance between alleviating court calen-

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[1] *See Colon v. Mack*, 56 F.3d 5, 7 (2d Cir. 1995); *Jackson v. City of New York*, 22 F.3d 71, 75 (2d Cir. 1994); *Romandette v. Weetabix Co.*, 807 F.2d 309, 312 (2d Cir. 1986); *Harding v. Federal Reserve Bank*, 707 F.2d 46, 50 (2d Cir. 1983); *Merker v. Rice*, 649 F.2d 171, 173-74 (2d Cir. 1981); *Chira v. Lockheed Aircraft Corp.*, 634 F.2d 664, 665 (2d Cir. 1980); *Theilmann v. Rutland Hosp., Inc.*, 455 F.2d 853, 855 (2d Cir. 1972) (per curiam).

> dar congestion and protecting a party's right to due process and a fair chance to be heard, and [5] whether the judge has adequately assessed the efficacy of lesser sanctions."

Alvarez, 839 F.2d at 932 (quoting *Harding*, 707 F.2d at 50) (internal quotations omitted). No single factor is ordinarily dispositive. *Nita*, 16 F.3d at 485.

In deciding on the suitability of lesser sanctions, and whether the sanctions should be aimed primarily against the party or the attorney, it can be important for the district court to assess the relative roles of attorney and client in causing the delay, as well as whether a tactical benefit was sought by the delay. In making this statement, we are cognizant of the fact that a client is ordinarily bound by the acts of his lawyer, and this—of course—extends to behavior that would justify a dismissal for failure to prosecute. *Link*, 370 U.S. at 633-34 & n.10; *cf. Pioneer Inv. Servs. v. Brunswick Assocs.*, 113 S. Ct. 1489, 1499 (1993).[2] Nothing we say today contradicts that basic principle. This principle, however, does not relieve the district court of the obligation to consider the relevant factors before dismissing an action—especially the suitability of lesser sanctions. When the district court considers the appropriate sanction for failure to prosecute an action, the more the delay was occasioned by plaintiff's personal obstruction, or was designed to benefit the plaintiff's strategic interests, the more suitable the remedy of dismissal. Conversely,

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[2] *Pioneer* is not directly pertinent because in that case the plaintiff had defaulted, and the question was whether the plaintiff should be relieved of the default on the grounds that it had been caused by excusable neglect. Here no default has occurred. The district court rather faced a discretionary decision whether to impose sanctions and, if so, what sanctions.

the more the delay was occasioned by the lawyer's disregard of his obligation toward his client, the more this factor argues in favor of a less drastic sanction imposed directly on the lawyer.

Numerous circuits, with the support of leading commentators, have indicated that, at least absent prejudice, dismissal for failure to prosecute is inappropriate where the fault clearly lay in the lawyer's failure to attend to his client's business, and the court failed to consider alternative sanctions. *Hillig v. Commissioner*, 916 F.2d 171, 174 (4th Cir. 1990); *Shea v. Donohoe Constr. Co.*, 795 F.2d 1071, 1077-78 (D.C. Cir. 1986); *In re Hill*, 775 F.2d 1385, 1387 (9th Cir. 1985) (per curiam); *In re Russell*, 746 F.2d 1419, 1420 (10th Cir. 1984) (per curiam); *Rogers v. Kroger Co.*, 669 F.2d 317, 321-23 (5th Cir. 1982); *Carter v. City of Memphis*, 636 F.2d 159, 161 (6th Cir. 1980); *Moore v. St. Louis Music Supply Co.*, 539 F.2d 1191, 1193 & n.2 (8th Cir. 1976); *see also Ball v. City of Chicago*, 2 F.3d 752, 758 (7th Cir. 1993); 9 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* §§ 2369 nn.74-76 (1971).[3] We have long-suggested imposing sanctions directly on dilatory lawyers in appropriate cases, and we continue to commend to our district judges this "sound practice." *Ball*, 2 F.3d at 758. *See Litton Sys. Inc. v. AT & T Co.*, 700 F.2d 785, 828 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *Cine Forty-Second St. Theatre Corp. v. Allied Artists*, 602 F.2d 1062, 1069 (2d Cir. 1979)(Oakes, J., concurring); *Schwarz v. United States*, 384 F.2d 833,

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[3] *Woodson v. Surgitek, Inc.*, 57 F.3d 1406, 1417-18 (5th Cir. 1995), is not the contrary. There, although the delay was attributable to counsel, the attorney's obstruction was for the apparent benefit of the client, making dismissal quite appropriate.

836 (2d Cir. 1967); *cf. Baker v. Latham Sparrowbush Assocs.*, 72 F.3d 246, 253 (2d Cir. 1995).[4]

Of course, other factors may also be relevant, including those set forth in *Alvarez*. In particular, where opposing parties are found to have been meaningfully prejudiced by a plaintiff's delay, this factor speaks strongly in favor of dismissal, and may well override the hardship to plaintiff. *See Shea*, 795 F.2d at 1074-75.

II.

In this case, some of the pertinent factors seem to favor dismissal; others appear to favor a lesser sanction. But none of the relevant factors were considered by the district court.

Most importantly, although a number of alternative remedies were available, *see Shea*, 795 F.2d at 1078-79 (describing possible alternative sanctions), the district court failed to consider the possibility of alternative penalties before imposing the "drastic remedy," *Merker v. Rice*, 649 F.2d 171, 173 (2d Cir. 1981), of dismissal. *See, e.g., Colon*, 56 F.3d at 7. Notably, instead of dismissing the case, the court might have imposed financial penalties on the lawyer, the client, or both.

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[4] Some circuits require that district courts provide notice directly to the client before dismissing for failure to prosecute. *See, e.g., Dunbar v. Triangle Lumber & Supply Co.*, 816 F.2d 126, 129 (3d Cir. 1987); *Shea*, 795 F.2d at 1078. Others disagree. *See Ball*, 2 F.3d at 756 ("The district judge has . . . , though not the duty[,] the power to notify the plaintiff of the impending demise of his suit as a result of his lawyer's delicts and omissions and to give the plaintiff an opportunity to retain substitute counsel . . . ."). Without ruling on the question, we encourage district judges to give notice directly to the client where there is reason to suspect that attorney incompetence is about to sink a client's case, so that the litigant may attempt to remedy the situation.

There was excellent reason to consider imposing penalties on Dodson's lawyer, rather than on Dodson. The record strongly suggests that it was Dodson's lawyer, not Dodson, who was responsible for failing to advance the case. Furthermore, it appears that the attorney caused the delay in derogation of, rather than to benefit, his client's interests. Prior to Dodson's retention of an attorney, he had actively pursued his cause, first before the EEOC, and then in the district court. Only after counsel was hired did progress cease. The attorney's inaction stands in stark contrast to the plaintiff's vigorous efforts to advance his cause before he was represented. And, it appears that the attorney's delays were not designed to benefit the plaintiff's strategic interests.

Mareno's spurious justifications of his behavior proffered in this court tend to confirm that he, not the plaintiff, was responsible for the delay. In bringing this appeal, Mareno casts blame in all directions. The trial judge, Mareno claims, abdicated his duty under Fed. R. Civ. P. 16(b) to impose a scheduling order. He contends that "in the federal venue the attorney gets his or her marching orders . . . from the trial judge." He argues that, in the absence of a scheduling order, he was barred from engaging in discovery or taking other action to advance the case. The government, Dodson's lawyer argues further, abdicated its "responsibilities of conscience" by failing to aid plaintiff's cause sufficiently.

These claims are entirely frivolous. It was the attorney's responsibility to press his client's case. *See, e.g.*, *Lukensow v. Harley Cars*, 124 F.R.D. 64, 66 (S.D.N.Y. 1989) ("It is not the duty of the Court . . . to contact plaintiffs and to urge or require them to prosecute this action, nor are defendants under any duty to take any steps to bring this case to trial."). And whatever coun-

sel's responsibility in the first instance, it was intensified upon his receipt of the government's letter indicating its intent to move for dismissal. *See GCIU Employer Retirement Fund v. Chicago Tribune Co.*, 8 F.3d 1195, 1201 (7th Cir. 1993) (noting that "an earlier lack of diligence is not grounds for dismissal when the plaintiff is currently displaying diligence") (quoting *Marks v. San Francisco Real Estate Bd.*, 627 F.2d 947, 948 (9th Cir. 1980)).

While it is true that government attorneys have an ethical obligation to be fair to opponents, *cf. Zimmerman v. Schweiker*, 575 F. Supp. 1436, 1440 (E.D.N.Y. 1983), this duty does not require the government as defendant to prosecute a plaintiff's case for him. Similarly, although the trial judge should enter a scheduling order, *see* Fed. R. Civ. P. 16(b), the judge's failure to do so does not relieve counsel of either the right or the duty to press his client's cause. Counsel was free to pursue discovery without a scheduling order. Mareno apparently recognized this, as he noticed and took the deposition of Ozimek in 1990. Furthermore, if Mareno felt some advantage was to be gained by a scheduling conference, he could have requested one at any time.

There is no way for us to be certain, of course, that Dodson was not somehow complicit in his attorney's delays, nor that the delays were not undertaken by Mareno for Dodson's benefit. Those are matters of fact for the district court to assess. The district court did not explore these issues or the efficacy of alternative sanctions before dismissing Dodson's case. As we have noted, dismissal is a remedy that a district judge should generally impose "only when he is sure of the impotence of lesser sanctions." *Chira*, 634 F.2d at 665.

In remanding for reconsideration, we make no suggestion as to what conclusions the district judge should reach. Our reversal of the dismissal order is not intended to suggest that dismissal is not an appropriate remedy. We recognize that some of the factors suggested in *Alvarez*, in particular the possibility of prejudice to the government, may well argue in support of dismissal.

Conclusion

For the reasons set forth above, the judgment of the district court is vacated. We remand for further proceedings consistent with this opinion. Plaintiff's attorney is directed to furnish a copy of this opinion to his client. The district court shall insure that this order has been complied with.

APPENDIX B - ORDER ON REHEARING

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 16th day of October one thousand nine hundred and ninety-six

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THOMAS DODSON,
Plaintiff-Appellant,

v Dkt No: 95-6035

MARVIN RUNYON, Postmaster General for the U.S. Postal Service,
Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Thomas Dodson,

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: Beth J. Meador,
Administrative Attorney